STATE OF MICHIGAN

SUPREME COURT

CHARLES STARKS, JR.,

Plaintiff/Appellant,

v

MICHIGAN WELDING SPECIALISTS, INC., a Michigan corporation, AUGUST F. PITONYAK, an individual, and DEBORAH ULRY, an individual,

Defendants/Appellees.

Supreme Court No. 130283
Court of Appeals No. 257487
Lower Court No. 2001-5581-CZ

_____/

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130283

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction of this matter pursuant to MCR 7.301, and MCR 7.302.

Rule 7.301, states, in pertinent part, as follows:

> **(A) Jurisdiction.** The Supreme Court may:
>
> (1) review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223-9.226);
> (2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.302);
>
> MCR 7.301 (A)(1),(2).

MCR 7.302 specifies the grounds upon which leave may be granted.

> (B) Grounds. The application must show that
>
> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> . . .
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; . . .
>
> MCR 7.302 (B)(1)-(3), (5).

COUNTERSTATEMENT IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Appellant seeks leave to appeal a court of appeals' Order dated November 29, 2005, which affirmed the opinion and order of the trial court. The grounds upon which this Court grants leave are well established, as set forth in Michigan Court Rules:

> (B) Grounds. The application must show that
>
> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> . . .
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; . . .
>
> MCR 7.302 (B)(1)-(3), (5).

Appellant asserts the instant case involves principles of major significance to the state's jurisprudence, and that the court of appeals decision was clearly erroneous. Neither assertion is accurate, and neither is supported by evidence or applicable law. The issues presented here are already well settled by years of Michigan law, upon which the court of appeals opinion was based. There are no issues of first impression, significant to the state's jurisprudence, or in conflict with any decision. Appellant has failed to demonstrate how use of this Court's time and resources would be justified in such an appeal, and Appellant's application for leave must fail as a matter of law.

COUNTERSTATMENT OF QUESTIONS INVOLVED

I. WAS THE APPELLATE COURT'S DECISION PROPER?
Appellant says "No."
Appellee says "Yes."

II. DID THE APPELLATE COURT PROPERLY AFFIRM THE TRIAL COURT'S GRANT APPELLEES' MOTION FOR RECONSIDERATION
Appellant says "No."
Appellee says "Yes."
Court of Appeals says "Yes."

III. DID THE APPELLATE COURT PROPERLY AFFIRM THE TRIAL COURT'S DISMISSAL OF APPELLANT'S STATUTORY CONVERSION CLAIM?
Appellant says "No."
Appellee says "Yes."
Court of Appeals says "Yes."

IV. DID THE APPELLATE COURT PROPERLY AFFIRM THE TRIAL COURT'S DISMISSAL OF APPELLANT'S FRAUDULENT CONVEYANCE CLAIM?
Appellant says "No."
Appellee says "Yes."
Court of Appeals says "Yes."

V. DID THE APPELLATE COURT PROPERLY AFFIRM THE TRIAL COURT'S DISMISSAL OF APPELLANT'S CLAIMS AGAINST PITONYAK INDIVIDUALLY?
Appellant says "No."
Appellee says "Yes."
Court of Appeals says "Yes."

VI. DID THE APPELLATE COURT PROPERLY AFFIRM THE TRIAL COURT'S DENIAL OF APPELLANT'S COUNTER MOTION FOR SUMMARY DISPOSITION?
Appellant says "No."
Appellee says "Yes."
Court of Appeals says "Yes."

VII. DID THE APPELLATE COURT PROPERLY AFFIRM THE TRIAL COURT'S DENIAL OF APPELLANT'S CONSTRUCTIVE TRUST CLAIM?
Appellant says "No."
Appellee says "Yes."
Court of Appeals says "Yes."

APPELLEE'S COUNTERSTATEMENT OF FACTS

Appellant seeks this Court's review of an Order issued by the court of appeals on November 29, 2005. *Exhibit A.* The court of appeals opinion soundly affirms the findings of the trial court.

Appellant originally sought review by the Michigan Court of Appeals of a trial court Order dated May 13, 2004, that being an Order Granting Appellees' Motion for Reconsideration. *Exhibit B.* The May 13, 2004 Order granted Appellees' Motion for Reconsideration, following a denial of Appellees' Motion for Clarification. *Exhibit C.* Appellees sought clarification of the trial court's July 2, 2003 opinion, which dismissed all but one count of Appellant's Complaint, but was worded in such a way that it was unclear and somewhat conflicted. *Exhibit D.* In clarifying its July 2, 2003 opinion, the trial court dismissed the remaining claims against the Appellees. *Exhibit B.*

This case and its lengthy history arise from a prior action initiated in 1994. Judgment in the 1994 case entered long before Appellant brought any claims against the current Appellees. In the 1994 action, current Appellant Starks and his company, Accurate Welding, Inc. ("Accurate") obtained a Judgment against a company known as Dualtech, Inc. ("Dualtech") and Lawrence Ulry ("Ulry"), a principal of Dualtech. The filing of, and Judgment in, the 1994 suit did not in any way involve present Appellees August F. Pitonyak ("Pitonyak") and Michigan Welding Specialists, Inc. ("MWS"). These Appellees had nothing to do with the underlying dispute.

After Appellant obtained a Judgment against Ulry in that case, Appellant brought post-judgment "garnishment" claims against the instant Appellees. Appellant's

allegations against Appellees have always essentially turned upon a single transaction: the sale of Dualtech assets foreclosed upon by secured creditors—two banks—and sold by those creditors to MWS, through its officer, Pitonyak. In the garnishment claim, Appellant alleged, among other things, fraud in the sale of the foreclosed Dualtech assets. This was Appellant's first attempt to claim fraud regarding this transaction.

Despite Appellant's claims, the evidence shows that the assets were covered by security agreements, that the banks—priority secured creditors—foreclosed on the assets, and that the assets were later offered for sale. MWS purchased the assets of Dualtech from National City and Lakeside Community Banks, subsequent to bank foreclosures of these secured assets. Importantly, Appellant had full notice prior to the sale, but declined to participate. Appellant still continues to assert that MWS is a continuation of Dualtech, but this is not the case. Frank Pitonyak and an individual named Doug Caudell formed MWS, a new company, in 2001. It has never been disputed that MWS later hired Ulry and his wife as employees. Neither Ulry nor his wife, however, has ever been an officer, shareholder or had any controlling interest or authority in MWS.

After Appellant named MWS as a Garnishee in the 1994 action, claiming fraud, the trial court dismissed claims against MWS in that case. However, during the pendency of the 1994 case, in 2001, Appellant also brought the instant action against both Pitonyak and MWS. This time, Appellant's claims were for Successor Liability, Fraudulent Transfer, Civil Conspiracy, and Constructive Trust. Still, all of the allegations centered upon the sale of the foreclosed assets—the same transaction. Appellant's claims were primarily as to MWS, but Appellant also asserted some claims as to Pitonyak individually.

In a May 24, 2002 Opinion and Order, the trial court denied Judgment against MWS in the 1994 case, stating it saw no evidence of fraud. *Exhibit E.* The 2001 case, however, was still pending. The court initially granted partial summary disposition for Appellees.

On July 2, 2003, the trial court issued an Opinion and Order, disposing of all but one count in Appellant's Complaint, but noting "other claims" still existed. *Exhibit D.* In February, 2004, in preparation for trial, Appellees requested Clarification of the July 2, 2003 Opinion and Order. In reviewing its opinion, the trial court held that in absence of fraud, the remaining claims should be dismissed as well. *Exhibit B.*

The trial court issued several opinions involving this sale, both in the 1994 action and in the instant action. *Exhibit B, Exhibit C, Exhibit D, Exhibit E.* The opinions contain detailed statements regarding the evidence of the transaction at issue—sale of the assets formerly held by Dualtech, secured by security agreements, foreclosed upon, and sold to MWS. *Exhibit B, Exhibit D, Exhibit E.* The opinion in the 1994 case dismissed Appellant's claims. *Exhibit E.* Even the initial opinion in the 2001 case, issued July 2, 2003, stated an absence of fraud. *Exhibit D.*

Upon examination the pleadings and the submitted evidence, the lower court, time and again, found the sale of the assets to be a valid transaction, with no evidence of fraud. In its May 13, 2004 opinion, the trial court acknowledged that it had only two reasons for not granting full summary disposition for Appellees in its July 2, 2003 Order. These were: 1) confusion and commingling of issues and law between successor liability and fraudulent transfer, and 2) Appellees' "failure" to address issues argued in Appellant's Counter-Motion for Summary Disposition. *Exhibit B.* In its May 13, 2004 opinion, the trial

court corrected its July 2 opinion as to the issues, and acknowledged the fact that Appellees had not addressed Appellant's Counter Motion because it was untimely filed. *Exhibit B, p 4.*

Appellant's allegations have always centered around the same transaction, and allegations of fraud form the basis all of Appellant's claims. Without proof of fraud, each of Appellee's claims must fail as a matter of law. The trial courts and the appellate court have recognized this and issued their well-reasoned opinions accordingly. Appellant now revisits the same issues and the same evidence which has been twice presented to the trial court, then to the appellate court. Appellant fails to acknowledge that it is not simply one lower court opinion stating a lack of evidence showing fraud, but several. Each time, the courts have examined the underlying transaction and found no fraudulent action on the part of these Appellees. The trial court's opinions dismissing Appellants claims, and the Michigan Court of Appeals Opinion of November 29, 2005, must be affirmed. Appellant's request for leave to appeal to this Court must be denied.

LAW AND ARGUMENT

I. THE APPELLATE COURT'S DECISION WAS NOT CLEARLY ERRONEOUS, AND WAS BASED UPON WELL-ESTABLISHED LAW.

Appellant claims that the appellate court's findings were clearly erroneous, will cause "material injustice" because the decision "conflicts" with a decision of this Court or "another decision" of the court of appeals. None of these statements are accurate, and are merely empty assertions for which Appellant offers no support whatsoever. In fact, the appellate court substantiated its opinion with well-established law.

"A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm,* 255 Mich App 637, 652; 662 NW2d 424 (2003). "An appellate court will give deference to 'the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Id.*

Here, as has been the case throughout the history of this litigation against these Appellees, Appellant has repeatedly characterized the facts with reckless abandon, and with little more than a polite glance towards the documentary evidence. The Michigan Court of Appeals issued a well thought out opinion, based upon thoroughly established Michigan law and addressing all of the issues before it. Any "issues of significance" are already well-defined by Michigan law, and the decision does not conflict with that law. The court of appeals committed no error, nor did the trial court. The facts, issues and evidence of this case have been examined; the decision of the court of appeals, affirming the decision of the trial court, must stand. Appellant's request for leave must be denied.

II. THE APPELLATE COURT PROPERLY FOUND THAT THE TRIAL COURT DID NOT ERR IN GRANTING APPELLEES' MOTION FOR RECONSIDERATION.

A. The Appellate Court Committed No Error in Finding The Trial Court's Actions and Procedure Proper Under Michigan Law, and Finding No Abuse of Discretion by the Trial Court.

Michigan law gives the trial court discretion to correct any errors it may have made; the appellate court did not err in affirming the trial court's decision. In fact, applying well-established law and the Michigan Court Rules, the appellate court stated that "[t]he rule allows the court considerable discretion in granting reconsideration to correct mistakes, to

preserve judicial economy, and to minimize costs to the parties. See *Bers v. Bers*, 161 Mich.App 457, 462; 411 NW2d 732 (1987). [*Kokx v. Bylenga*, 241 Mich.App 655, 658-659; 617 NW2d 368 (2000).] Accordingly, the trial court did not abuse its discretion in reconsidering its earlier ruling." *Exhibit A*.

The trial court proceeded properly. Generally, appellate courts review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Cason*, 609-610; *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). Grant of a motion for reconsideration is a matter within the discretion of the trial court. MCR 2.119; *Charbeneau v Wayne Co General Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989).

MCR 2.119(F) clearly allows a trial court discretion to grant a rehearing, and give the case a "second chance." *Bers v Bers*, 161 Mich App 457; 411 NW2d 732, 734 (1987). MCR 2.119(F) allows a trial court to correct mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. *Bers*, 734. The time requirement insures the motion will be brought expeditiously but is not jurisdictional. *Id.* Further, this rule allows "a court's exercise of discretion on when to give a party a 'second chance' on a motion it has previously denied." *Michigan Bank-Midwest v DJ Reynaert, Inc*, 165 Mich App 630, 646; 419 NW2d 439 (1988).

Motions for clarification are likewise within court discretion, and a court may grant a motion clarifying an order it has issued. In *Pioneer State Mutual Insurance Company v Titan Ins Co*, 252 Mich App 330, 338; 652 NW2d 469 (2002), an issue was not "explicitly addressed until Pioneer filed a motion for clarification." *Id*, 338. A party in *Pioneer* sought clarification of what parties were dismissed and to whom summary disposition was denied. *Id.* The *Pioneer* court found no error in the trial court's granting that motion.

Here, on July 2, 2003, the trial court disposed of all but one count in Appellant's Complaint, but noted "other claims." *Exhibit D.* In February, 2004, in preparation for trial, Appellees filed a Motion for Clarification, requesting clarification of the remaining issues. In the July 2, 2003 order, the trial court expressly dismissed all but one claim in Appellant's Complaint. *Exhibit D.* The Order granted Appellees' Motion for Summary Disposition ". . . to the extent that Count II, IV, and V are DISMISSED as against Pitonyak and Michigan Welding." *Exhibit D.* These dismissed Counts were:

II Conspiracy to Commit Conversion, as to MWS and Pitonyak;
IV Fraudulent Conveyance; [1]
V Constructive Trust.

However, in the same Opinion, the Court denied Appellees' Motion for Summary Disposition as to Count I—Successor Liability—stating it was: ". . . NOT DISMISSED and the remaining claims against Pitonyak individually are NOT DISMISSED." *Exhibit D, p 15.*

Clearly, the trial court stated that only the Successor Liability Count—Count I—of Appellant's Complaint survived, and dismissed all Counts brought against Pitonyak individually. "Successor Liability," the only remaining Count, was applicable to a

[1] Count III was brought against Deborah Ulry only, and was therefore not a subject of the Motion nor the Opinion.

corporate entity and not brought as to Pitonyak individually, but the Opinion referenced "remaining claims" against Pitonyak. *Exhibit F.* Therefore, given the trial court's express finding of an absence of fraud, the elements of Count I simply did not match the trial court's holding. *Exhibit B.*

The trial court denied the Motion for Clarification on April 22, 2004. *Exhibit C.* Still seeking clarification of the Opinion and Order, Appellees timely filed a Motion for Rehearing of the April 22, 2004 Order. The trial court, in its discretion, granted that Motion for Reconsideration, clarifying its prior order. *Exhibit B.*

Clearly, in reconsidering the Motion for Clarification, and in clarifying its Opinion, the trial court stated that it wished to correct an error, a decision well within its discretion. In its May 13, 2004 Opinion, the court stated, in part:

> The Court had previously ruled that there remained genuine issue of material fact concerning whether there was a merger or consolidation of MWS with Dualtech. However, as has become evident by a review of the case law now proffered in support of MWS's contrary position, the Court acknowledges it was in error. *Exhibit B.*

The trial court properly exercised its discretion, as did the appellate court upon review. The appellate court must be affirmed. Appellant's request for leave must be denied.

B. <u>The Appellate Court Properly Found, Based on Michigan Law, That the Trial Court Did Not Err, but Instead Properly Considered the Documentary Evidence and Issued its Opinions and Orders, Acting Properly and Within Its Discretion.</u>

i. Assuming, *arguendo*, that the Trial Court's Order was Not a Grant of Rehearing on Clarification, It Would Be a Grant of Summary Disposition Under MCR 2.116(C)(10), Which May be Properly Brought and Granted at Any Time.

Review of a trial court's grant or denial of summary disposition is de novo. *Auto Club Group Ins Co, supra,* 479. The appellate court found that, even if the Appellant's motion was

another request for summary disposition, it was properly brought and granted. The appellate court stated, in part:

> Assuming defendant's motion is more properly characterized as a motion for summary disposition, we review the trial court's ruling de novo. . . . A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim. . . . A trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. . . . Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Exhibit A, p 2.*

If the motion or the order issued upon that motion was not one for Clarification, were it to be characterized in another fashion, it would be characterized as a summary disposition motion. Generally, the reviewing court should look to the substance of a decision to determine what the ruling held. *Meagher v Wayne State University*, 222 Mich App. 700, 719; 565 NW2d 401 (1997); *See also People v Mehall*, 454 Mich 1; 557 NW2d 110 (1997).

In this instance, the trial court left remaining claims in its initial order, hesitating to find a lack of genuine issue of material fact in a conflicted opinion. *Exhibit B.* However, the Michigan Court Rules, MCR 2.116(D)(3), state "The grounds listed in subrule [2.116] (C) . . . (10) may be raised at any time." MCR 2.116(D)(3).

A motion for summary disposition pursuant to MCR 2.116 (C)(10), tests the factual basis of the Appellant's claims. *Michaels,* 649; *Stehlik v Johnson,* (On Reh) 206 Mich App 83, 85; 520 NW2d 633, 634 (1994); *Hughes v PMG Building, Inc,* 227 Mich App 1, 4; 574 NW2d

691 (1997). The court must consider the pleadings, affidavits, depositions and other documentary evidence submitted by the parties and grant the motion if there is no genuine issue regarding any material fact. *Hughes*, 4, emphasis added. The appellate court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Id.* The test for summary judgment is whether the kind of record may be developed, giving the benefit of reasonable doubt to the opposing party, which would leave an issue open upon which reasonable minds might differ. *Soderberg v Detroit Bank & Trust Co*, 126 Mich App 474, 479; 337 NW2d 364, 367 (1983); *Abode, supra.* In reviewing a motion under MCR 2.116(C)(10), a trial court considers evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* The motion is properly granted if the affidavits or other documentary evidence show no genuine issue in respect to any material fact; the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314, 317 (1996).

Here, the trial court considered all of the pleadings and documentary evidence before it. *Exhibit B, Exhibit D.* That evidence included deposition testimony, corporate documents, and contracts, among other things. The evidence showed: 1) the assets were foreclosed upon *Exhibit F*; 2) MWS is a separate company, and Ulrys are not officers *Exhibit H*; 3) MWS was a purchaser of assets (*Exhibit I)* and not a successor corporation. Although the trial court did dismiss the remaining Count of Appellant's Complaint in the May 13, 2004 Order, the trial court did not err in doing so whether it chose to do so by clarification

or by summary disposition. The trial court proceeded properly, and the appellate court confirmed. Appellant's request for leave must be denied.

ii. The Trial Court Properly Found No Genuine Issue of Material Fact.

Appellant asserts that the trial court "made a mistake" in finding that it was undisputed that the Bank demanded the assets. Based upon the evidence, there was no mistake. The Bank sent Dualtech a letter dated May 24, 2001, demanding surrender all of Dualtech's personal property, including accounts receivable. *Exhibit G.* On May 25, 2001, Dualtech acknowledged the demand letter and agreed that it would comply. *Exhibit I.* It is undisputed that Appellant was aware of one or more of the Banks as secured creditors. Appellant admitted at deposition that the assets had been foreclosed upon by the Bank. *Exhibit J, p 44.* Appellant's counsel, in a letter dated July 3, 2001, further noted "Lakeside Community Bank and National City Bank may have priority." *Exhibit K.* Appellant himself also admitted his knowledge that the banks had priority as secured creditors. *Exhibit J, Starks' Deposition,* p 59, 65. Depositions of bank personnel further established that Dualtech surrendered the assets to the Bank. *Exhibit L.*

The lower court found no evidence of fraud and no issue of material fact. As was affirmed by the appellate court, without evidence of fraud, Appellant's claims must fail. Likewise, Appellant's request for leave must fail.

iii. Any "Good will" of Dualtech was foreclosed upon, as it was part of the Security Agreement held by the Bank.

The appellate court affirmed the trial court's findings, stating, in part, "National City had a valid, prior security interest in all of Dualtech's assets, including its goodwill.

When National City foreclosed on Dualtech's assets, it extinguished any interest Appellant had in them." *Exhibit A*.

The good will was sold by the bank, along with the other foreclosed assets. "Good will" is considered an intangible asset, and is defined as "property of an intangible nature," and "the favor which the management of a business wins from the public" and "the fixed and favorable consideration of customers arising from established and well-conducted business." *Black's Law Dictionary (5th ed); See also Malone & Hyde, Inc v US*, 568 F2d 474, 475 (CA 6, 1978).

An asset, tangible or intangible, may be secured by a lien or encumbrance. The Uniform Commercial Code defines a "general intangible" as follows:

> (pp) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software. MCL 440.9120(pp).

Although the Banks were clearly secured creditors, and clearly foreclosed upon the Dualtech assets, Appellant asserts that Dualtech's "good will" was transferred directly to MWS and Pitonyak "by Deborah Ulry, Ulry and Dualtech. " In his brief, Appellant points to Interrogatories of Pitonyak as an admission that the good will was not paid for. None of the assets were paid for individually, as all were included in the bulk sale price. *Exhibit M, Exhibit I.* Although Appellant admits that the banks foreclosed, he continues to disregard the fact that MWS bought the assets not from Dualtech, but from Lakeside Community Bank and National City Bank. *Exhibit J.* The Security Agreement between

Dualtech and the bank included "general intangibles." *Exhibit N.* Dualtech and Appellant received Notice of Disposition of Collateral, including general intangibles, and Appellant's counsel responded. *Exhibit O.* Appellant chose not to participate in the sale. Any good will which may have existed was in fact secured by the Security Agreement and, eventually, validly sold with the remaining assets. The trial court did not err in its determination that the good will was a validly transferred asset, and the appellate court affirmed.

iv. Ulrys are not officers of MWS, as is evident from the corporate documents.

The submitted documents clearly show that Ulrys are not officers of MWS. Appellant has, from the beginning, clung to a bank printout which mistakenly named Ulry's wife as an 'officer' of MWS. This has been addressed repeatedly at the lower court level and again before the appellate court; each time Appellant's assertions have been shown to be without merit. The bank provided a letter of explanation. *Exhibit P.* MWS never disputed having hired the Ulrys as employees. Ulry's wife was hired as an office manager, yet Appellant continues to assert that Ulry's wife is an officer in MWS. The corporate documents clearly show the officers are Pitonyak and Douglas Caudell—neither Ulry nor his wife have ever been officers of MWS. *Exhibit H.*

The trial court acted properly in considering the evidence, and committed no error. The appellate court properly affirmed. Appellant's request for leave must be denied.

III. THE APPELLATE COURT PROPERLY AFFIRMED; THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S STATUTORY CONVERSION CLAIM: APPELLANT FAILED TO SHOW HE EVER HAD TITLE OR RIGHT TO THE PROPERTY AT THE TIME OF THE ALLEGED "CONVERSION," AND MWS VALIDLY PURCHASED THE ASSETS FROM THE BANK.

The appellate court, upon review, affirmed the trial court's dismissal of Appellant's conversion claims, which Appellant labeled "Conspiracy to Commit Conversion;" Appellant failed to show the necessary elements.

> To support an action for conversion, the defendant "must have obtained the [property] without the owner's consent to the creation of a debtor-creditor relationship" and "must have had an obligation to return the specific [property] entrusted to his care." *Lawsuit Financial, LLC v. Curry,* 261 Mich App 579, 591; 683 NW2d 233 (2004), quoting *Head, supra* at 111-112. The plaintiff bears the burden of proving he had right or title to the property at the time of an alleged conversion. *Wessels v. Beeman,* 87 Mich. 481, 488; 49 NW 483 (1891).
>
> In this case, Dualtech consented to a debtor-creditor relationship with National City Bank (National City), giving it a security interest in all of its "inventory, chattel paper, accounts, equipment and *general intangibles* ... whether now owned or hereafter acquired, whether now existing or hereafter arising and wherever located." The evidence shows that National City foreclosed on all of Dualtech's assets, and plaintiff's only offering to refute this is his "gut feeling." Plaintiff admitted that National City and Lakeside Community Bank were secured creditors with priority over him, and that he had no right or title to Dualtech's assets at the time National City transferred them to MWS. Because plaintiff failed to offer any evidence that Dualtech did not consent to National City's security interest or that he had any right to the assets at the time that National City sold them to MWS, the trial court did not err in dismissing plaintiff's claims for statutory conversion. *Exhibit A.*
>
> Further, the statutory section states:
>
> A person **damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person** buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property **knew that the property was stolen, embezzled, or converted** .... *MCL 600.2919a, emphasis added.*

To be liable under MCL 600.2919a, a defendant must have known that property at issue was stolen, embezzled, or converted. *Willis v New World Van Lines, Inc*, 123 F Supp 2d 380, 392 (ED Mich, 2000). Further, "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.' . . . Statutory conversion, by contrast, consists of knowingly 'buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.' " *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), citing *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). To support this claim, a plaintiff must prove a combination of two or more persons engaged in a concerted action designed to accomplish either a criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means, and the plaintiff bears the burden of showing he had right or title to the goods at the time of an alleged conversion. *William E Wessels v Washington Beeman*, 87 Mich 481; 49 NW 483 (1891).

The undisputed evidence shows Dualtech surrendered its assets to the Bank. *Exhibit G; Exhibit J, Starks, p 44; Exhibit I; Exhibit L, p 28.* Appellant admitted the banks were secured creditors. *Exhibit J, p 65.* Appellant's counsel admitted that the Banks had priority. *Exhibit K.* Appellant had no right or title to the property at the time the Bank transferred the assets to MWS. *Exhibit J, Starks p 58,65.* Appellant admitted he considered purchasing the assets from National City Bank after the foreclosure, but later decided not to, because, remarkably, he thought Defendant was paying too much for the assets. *Exhibit*

J, p 64; Exhibit Q. Also, Appellant makes no claims of "conversion" or "fraud" against either National City Bank or Lakeside Community Bank. *Exhibit J, Starks, p 59-60.*

Should Appellant have believed the assets belonged to him, he fails to explain why he would consider purchasing them. *Exhibit J, p 64.* The trial court properly found there no genuine issue of material fact, and the appellate court properly affirmed.

IV. THE APPELLATE COURT PROPERLY AFFIRMED; THE TRIAL COURT PROPERLY DISMISSED THE FRAUDULENT CONVEYANCE CLAIM.

The trial court properly found there was no fraudulent conveyance or transfer: Dualtech had validly surrendered its assets to secured creditors, who subsequently sold them to MWS. The appellate court affirmed, stating, in part:

> Applying these factors to the present case, plaintiff has not shown an intent to defraud. Plaintiff confounds the issue by failing to recognize that there are two distinct transfers that occurred here. First, Dualtech transferred a security interest in all of its assets to National City. This security interest was recorded at least two years before plaintiff obtained a judgment against Dualtech, and plaintiff acknowledged that National City's interest in Dualtech's assets was valid and prior to his own. Second, National City transferred the assets to MWS through a valid sale, of which plaintiff had notice. Plaintiff simply misapplies the factors listed in MCL 566.34(2) because his argument presupposes a direct transfer from Dualtech to MWS. *Exhibit A.*

A debtor's transfer is fraudulent only in the following circumstances:

> **[I]f the debtor made the transfer** or incurred the obligation **in either of the following**:
>
> (a) With **actual intent to hinder, delay, or defraud any creditor** of the debtor.
>
> (b) **Without receiving a reasonably equivalent value in exchange** for the transfer or obligation, **and the debtor** did **either** of the following:
>
> (i) Was engaged or was about to engage in a business or a transaction **for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.**

(ii) **Intended** to incur, or **believed or reasonably should have** believed that **he or she would incur, debts beyond** his or her **ability to pay as they became due**.

MCL 566.34(1), emphasis added.

The party seeking to set aside a conveyance as fraudulent bears the burden of proof. *Craft v US*, 65 F Supp 2d 358 (WD Mich, 1999), aff'd, app dis, 233 F 3d 358. Fraud may not be presumed—"something more is required than the mere weight or preponderance of evidence. To establish fraud it is essential that the evidence should be clear, unequivocal and convincing. It must be cogent and leave the mind well satisfied that the allegations are true." *Nicholson* v *Scott*, 50 F Supp 209, 212 (ED Mich, 1943); *see also Wright v Brown*, 317 Mich 561; 27 NW2d 97 (1947).

> Fraud . . . is not easily proven. . . . The proving of fraud requires clear, convincing, and satisfactory proofs -- it must be affirmatively established by a preponderance of the evidence. . . . Fraud is not to be presumed and something more is required than mere weight or preponderance of evidence, to establish it; it is essential that evidence be clear, unequivocal, convincing, cogent, and leave the mind well satisfied that the allegations are true. *Lewis v Poes*, 9 Mich App 131, 140; 156 NW2d 41, 45 (1967), internal citations omitted.

Here, as the trial court and appellate court found, the evidence shows no fraudulent transfer. *Exhibit B, Exhibit D, Exhibit E.* Dualtech went out of business after giving valid notice to its creditors. *Exhibit G, Exhibit O.* The assets, after foreclosure and surrender, were validly sold to MWS. *Exhibit I.* Appellant admits he was aware Dualtech was indebted to National City Bank, and that there were Dualtech creditors with higher priority than he. *Exhibit J, p.19, 58; Exhibit R, #2.*

As the appellate court found, none of the elements are satisfied; Appellant's allegations of fraud remain unsupported. *Exhibit A.* Appellant claims that Pitonyak is an

"insider," but an insider, pursuant to statute, is: (1) a relative of the debtor or of a general partner of the debtor; (2) a partnership in which the debtor is a general partner; (3) a general partner in a partnership in which the debtor is a general partner; or (4) a corporation of which the debtor is a director, officer, or person in control. MCL 566.31. The corporate documents and tax statements for these two companies—Dualtech and MWS—clearly show different officers; Ulry is not part of MWS and Pitonyak is not part of Dualtech. *Exhibit S; Exhibit T.* Pitonyak and MWS do not meet the definitions necessary for Appellant's assertions to be true, and documents show that there is no "retained control." *Exhibit H, Exhibit N, Exhibit O.* The transfer "concealed," as Appellant has acknowledged his awareness. *Exhibit J.*

Appellant continues to assert a direct transfer from Dualtech, or Ulry, to MWS, when all evidence indicates otherwise. *Exhibit I, Exhibit N, Exhibit O.* MWS, through its officer, Pitonyak, entered into a valid lease/purchase agreement with National City Bank. *Exhibit I.* After foreclosure, the assets were then legally the property of the bank. Appellant had notice the sale was to take place, had opportunity to purchase the assets , and declined to do so. *Exhibit R; Exhibit J, p 23-24.* Appellant admits he had no evidence that any fraud ever occurred, apart from a "gut feeling:" *Exhibit J, p 49.* At deposition, Appellant stated:

> Q You also say that you believe that Frank Pitonyak is assisting Larry Ulry in avoiding their creditor, you, Mr. Starks. What information do you have that Mr. Pitonyak's involved with anything like that?
> A Basically knowing both individuals and a gut feeling, I guess. *Exhibit L, p 44, ln 4-9.*
> . . .

Q The only evidence you have . . . is your gut feeling . . . Is that what you testified to earlier?
A Correct. *Exhibit J, p 49.*

Appellant has never offered evidence to support a fraudulent transfer—the Banks were secured creditors, as Appellant admitted, and MWS purchased through lease/purchase agreements, which Appellant had every opportunity to take part in. The trial court found that this was the case:

> Moreover, even without the requirement of an initial finding that the conveyance is void, **the Court would still be persuaded in this case that the evidence only shows that the transfer was a bona fide transaction upon sufficient consideration and free from fraud**. While counter-plaintiff asserts that Michigan Welding makes payments to National City Bank "for the benefit of" Dualtech, the facts show Michigan Welding leased equipment once belonging to Dualtech and paid valuable consideration for its use. **The Court is persuaded the facts show a valid transfer.** *Exhibit D, emphasis added.*

The appellate court affirmed the proper dismissal of Appellant's fraudulent transfer claim. Appellant's request for leave must be denied.

V. NEITHER THE APPELLATE COURT NOR THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIMS AGAINST PITONYAK INDIVIDUALLY.

The trial court properly dismissed claims against Pitonyak individually. "As a general proposition, the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the corporation's stock." *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996), citing *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981). "A 'corporate veil[]' may be pierced only where an otherwise separate corporate existence has been used to 'subvert justice or cause

a result that is contrary to some other clearly overriding public policy.'" *Seasword v Hilti, Inc*, 449 Mich 542, 548 537 NW2d 221 (1995). Three requisites to piercing the corporate veil are: 1) the corporate entity must be a mere instrumentality of another entity or individual; 2) the corporate entity must be used to commit a fraud or wrong; 3) there must have been an unjust loss or injury to the plaintiff. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994). In order to justify a court's piercing the corporate veil, there must be some showing of fraud, sham or other improper use of the corporate form. *Michigan Bell Communications, Inc v Michigan Public Service Comm*, 155 Mich App 40, 46-47; 399 NW2d 49 (1986). Before the corporate veil may be pierced, an alleged fraud cannot be presumed; it must be proven by clear and convincing evidence. *Foodland*, 458.

As in his pleadings below, Appellant relies heavily upon the above-cited *Foodland* case. In *Foodland*, family members fraudulently conveyed assets among one another; circumstances included such things as "**overwhelming [evidence] that everyone knew that [defendant] was the de facto owner and operator . . . [Defendant] admitted . . . his wholesale operations and his brothers' stores loaned money back and forth** to each other. . . . New Metro **assumed $400,000 in debt with no consideration** as part of a package restructuring. . . ." *Foodland*, 457, *emphasis added.*

Here, Appellant failed show the existence of fraud. As the appellate court found:

> As we stated repeatedly in our discussion of the previous issues, plaintiff has presented no evidence of fraud. Additionally, Pitonyak could not have used Dualtech as his own instrumentality because he was not an officer or shareholder of Dualtech; he is an owner of MWS, which had no direct dealings with Dualtech, but rather purchased Dualtech's former assets from National City in a valid sale. Furthermore, although plaintiff suffered the loss of being able to collect his judgment from Dualtech, this loss was not unjust

> because, as even plaintiff admitted, National City's security interest in Dualtech's assets was prior to his own. The trial court, therefore, did not err.... *Exhibit A.*

First, Pitonyak is an officer and shareholder of corporation MWS, and acted at all times on behalf of MWS. *Exhibit H, Exhibit I.* As is evident from the undisputed facts, MWS is a fully-functioning, fully-capitalized entity. *Exhibit H.* The trial court specifically found no fraud. *Exhibit B, Exhibit D, Exhibit E.* Pitonyak did not use MWS as a "mere instrumentality;" Appellant failed to show that the corporate entity was used to commit a fraud or a wrong. Finally, any alleged loss or injury was not the fault of MWS or Pitonyak. Appellant simply declined to take part in the sale. *Exhibit J, Exhibit R.* The trial court properly dismissed claims as to Pitonyak, the appellate court affirmed.

VI. THE APPELLATE COURT PROPERLY AFFIRMED: TRIAL COURT PROPERLY DENIED APPELLANT'S COUNTER MOTION FOR SUMMARY DISPOSITION; APPELLANT'S MOTION WAS IMPROPERLY BROUGHT, AND WAS UNSUPPORTED BY THE EVIDENCE.

The trial court stated in its May 13, 2004 opinion that its failure to grant summary disposition for Appellees, as to the Successor Liability Count, was

> "[p]artly because defendants failed to specifically address plaintiff's argument in response to counter-motion, and partly because of the co-mingling of arguments regarding fraudulent conveyance and successor liability. . . " *Exhibit B.*

The trial court recognized that both were in error.

A. Appellant Failed to Timely Notice His "Counter-Motion for Summary Disposition."

Appellant's Counter Motion for Summary Disposition was untimely brought. The Michigan Court Rules clearly establish that motions for summary disposition under MCR

2.116 must be noticed for twenty-one (21) days, except as otherwise provided by rule, or where the court sets a different time.

> **(G) Affidavits; Hearing.**
> (1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.
> (a) Unless a different period is set by the court
> (i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and
> (ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.
> *MCR 2.116(G)(1)(a).*

A "counter-motion" for summary disposition under MCR 2.116 is simply a motion for summary disposition, and must be noticed under the same time frame. In the instant case, Appellant's "Counter-Motion" was served on April 14, 2003, only seven (7) days before the hearing date of April 21, 2003. As the trial court acknowledged in its May 13, 2004 Opinion, Appellant failed to properly notice his "Counter-Motion for Summary Disposition." *Exhibit C, fn 2.*

B. Even If Appellant Timely Filed His Motion, Which He Did Not, He Failed to Support His Claims.

Several of Appellant's allegations and statements of "fact" are not only inconsistent with the evidence, but are contradictory to one another. For example, Appellant accuses MWS of wrongly using a vendor number and somehow taking business from Appellant. Yet, when Appellant was asked if he had ever tried to obtain a vendor number, Appellant said he was "offered by Frank Pitonyak to try to get one one time, but I just didn't get around to it." *Exhibit J, Starks, p 32.*

Additionally, Appellant, in his brief, claims that Ulry "told" bank officials to demand Dualtech's assets. Appellant has failed to show how this relates to the current Appellees. MWS purchased everything from the Banks. *Exhibit I.* At no time has Appellant alleged any wrongdoing on the part of the bank. Somehow, according to Appellant's description, Ulry possesses the skills and the influence to command a national banking institution to do his bidding. Surely, if this were the case, Ulry would not be at the helm of one failed business after another, piloting them to inevitable failure.

The evidence shows that the banks were secured creditors of Dualtech, and that the banks validly foreclosed upon all assets of Dualtech, including good will. *Exhibit N.* Later, the banks validly sold those assets to MWS by lease-purchase agreement. *Exhibit I.*

Additionally, although MWS has no connection to Dualtech, Appellant continues to assert that because MWS purchased the assets of the former Dualtech, MWS and Pitonyak should be forced to pay Dualtech's debts. Dualtech and MWS have no common officers. *Exhibit H, Exhibit S.* Appellant admits Dualtech went out of business, surrendering its assets to secured creditors National City and Lakeside Community Banks. *Exhibit J.* Yet, Appellant wholly disregards the fact that MWS bought the assets not from Dualtech, but from Lakeside Community Bank and National City Bank in valid sales. *Exhibit I.* The Security Agreement between Dualtech and the bank included "general intangibles," which included good will. *Exhibit N.* As further explained below, good will is an intangible asset. The Purchase Agreement between the bank and MWS clearly includes "general intangibles." *Exhibit N.* Therefore, any "good will" which may have existed, which Appellant claims was ill-gotten, was in fact secured by the Security Agreement and validly

sold with the remaining assets. Like the rest of the assets, it was not purchased separately, but as a block, from the banks. *Exhibit I.* Appellant seeks to use a letter from an insurance company as "evidence" that these companies are one and the same. Notably, the correspondence indicates that prior correspondence to Appellee had gone unanswered—this is likely because it was addressed to the wrong company.

Appellant's claims revolve around the very same transaction (the asset sale) at issue in the 1994 case. The present claims, as in the 1994 case, are dependent upon Appellant's ability to show fraud by Pitonyak and MWS.[2] Appellant has never offered any evidentiary support for any of his claims.

The May 13, 2004 Order addressed only: Count I (Successor Liability) and individual liability of Pitonyak. As stated above, at its issuance, the July 2003 Opinion disposed of all but Count I of Appellant's Complaint. Plaintiff/Appellant did not seek leave to appeal the July 2, 2003 Opinion or the issues it dismissed.

Appellant, upon appealing the May 13, 2004 Opinion, sought reversal of the entire July 2, 2003 order. The trial court repeatedly found, not only in the July 2, 2003 and May 13, 2004 opinions, but also the 2002 opinion, that there was no evidence of fraud. *Exhibit B, Exhibit C, Exhibit D, Exhibit E.* Appellant seeks this Court's leave to appeal the appellate court's order affirming a proper decision of the trial court. Appellant's request for leave must be denied.

[2] Plaintiff/Appellant claimed fraud against Pitonyak both in two separate Circuit Court cases, as well as regarding Ulry's bankruptcy in Bankruptcy Court. In that Court, the Panel Trustee intervened, reviewed the facts, and dismissed Plaintiff/Appellant Starks' claim against Pitonyak.

C. The Evidence Does not Support a Finding of Successor Liability.

i. MWS may not be held liable for any of Dualtech's debts, because the necessary elements do not exist.

Pursuant to Michigan law, MWS is not a successor corporation to Dualtech. A purchasing corporation will only be responsible for the debts and liabilities of the selling corporation if: (1) if two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of the old corporation; (2) when by agreement, express or implied, the purchasing corporation promises to pay the debts of the selling corporation; (3) when the purchasing corporation is a mere continuance of the selling corporation; or (4) when the sale is fraudulent and the property of the selling corporation who is liable for its debts, can be followed into the hands of the purchaser. *Chase v Michigan Telephone Company*, 121 Mich 631 (1899). Michigan courts have repeatedly analyzed these exceptions, and found that a corporation which merely purchases assets is not a successor.

> Generally, when one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the selling corporation ... [Unless] there are [the following] exceptions:
>
> The law is well settled in regard to liability of the consolidated or purchasing corporation for the debts and liabilities of the consolidating or selling corporation. Such obligations are assumed (1) when two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of the old; (2) when by agreement, express or implied, a purchasing corporation promises to pay the debts of the selling corporation; (3) when the new corporation is a mere continuance of the old; (4) when the sale is fraudulent, and the property of the old corporation, liable for its debts, can be followed into the hands of the purchaser. Austin v Bank, 49 Neb. 412 [68 NW 628 (1896)]. *Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377, 382-383; 454 NW2d 222 (1990).

To establish successor liability, a plaintiff must show a purchasing corporation promised to assume responsibility for liabilities, or show a merger or continuation of the debtor corporation. *Jeffery v Rapid American Corp,* 448 Mich 178; 529 NW2d 644 (1995); *Antiphon, Inc, supra; Shue & Voeks, Inc v Amenity Design & Mfg, Inc,* 203 Mich App 124; 511 NW2d 700 (1993). "If two corporations merge, the obligations of each become the obligations of the resulting corporation." *Turner v Bituminous Casualty Co,* 397 Mich 406, 419; 244 NW2d 873 (1976). In the absence of these circumstances, a plaintiff must show a "*de facto*" merger. A *de facto* merger, however, can be found only in limited circumstances. These only exist where: (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations; (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation; (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. *Id.,* citing *Shannon v Samuel Langston Co,* 379 F Supp 797, 801 (WD Mich, 1974).

A continuity of enterprise requires more than hiring some of a former company's employees, or even conducting business at the same location. "[I]n deciding whether successor liability attaches, Michigan courts have often considered **whether the**

purchasing corporation holds itself out to the world as the effective continuation of the seller corporation." *Thompson v Mobile Aerial Towers*, 862 F Supp 175, 179 (ED Mich, 1994), emphasis added. Michigan law holds that the simple hiring of employees and conducting the same business as a seller corporation is wholly insufficient evidence of a *de facto* merger. *Shue & Voeks, Inc v Amenity Design & Mfg, Inc*, 203 Mich App 124, 128; 511 NW2d 700 (1993); *Lemire v Garrard Drugs*, 95 Mich App 520; 291 NW2d 103 (1980). Here, the evidence shows that MWS was a new company, and held itself out as a new company, not as Dualtech. There was no merger and no continuation. *Exhibit H, Exhibit I, Exhibit T.*

The second factor for consideration is "continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock." *Turner*, 419. First, there was no transaction between MWS and Dualtech, and no purchase using stock. Second, clearly the shareholders of the two companies are different. Thus, there is no continuity of shareholders between Dualtech and MWS. *Exhibit H, Exhibit T.* Appellant continues to allege that the Ulrys are shareholders of MWS, when clearly they are not. It has not been disputed that Deborah and Lawrence Ulry became employees of MWS. Employees and "shareholders" or "officers" are not the same, particularly under the analyses required here.

The third factor states that the "selling" company must go out of business as soon as practically possible. *Turner, supra.* Here, by the time MWS bought the assets from the bank, Dualtech had surrendered those assets to the bank, and was already out of business. *Exhibit B, Exhibit G, Exhibit H, Exhibit L, Exhibit N.*

The last factor, assumption of liability, was expressly denied in the Purchase Agreement with the banks. *Exhibit I.*

MWS may only be considered to be a successor corporation of Dualtech if certain, very narrow, exceptions apply -- in the absence of those exceptions, MWS may not be liable as a corporate successor. The evidence shows that the exceptions do not exist here. There was no merger of corporations, although Appellant continues, as he did below, to mix the elements of his claims, and the facts of the case. Many of Appellant's statements are either wholly immaterial, or are a mix of elements between fraudulent transfer and successor liability. Importantly, with regard to both issues, there was no transaction between MWS and Dualtech, but rather a foreclosure and subsequent sale to MWS by the banks. *Exhibit I, Exhibit N.* Clearly there was no assumption of liabilities and obligations pursuant to the Purchase Agreement between MWS and the banks. *Exhibit I.* The circumstances necessary to show *de facto* merger do not exist here, and MWS is no more than a mere purchaser of assets.

The appellate court stated, in part:

> All of the evidence presented to the lower court supports the finding that National City validly foreclosed on all of Dualtech's assets, including goodwill, and validly sold those assets to MWS. Likewise, plaintiff presented no evidence to the lower court that MWS expressly or impliedly assumed Dualtech's liabilities. This Court's inquiry, therefore, must focus on whether (1) the transaction was a consolidation or merger (either de jure or de facto), and (2) whether MWS is a "mere continuation" of Dualtech.
>
> . . .
>
> Here, these factors do not support the imposition of successor liability. First, although there was a basic continuity of operation and MWS hired many of Dualtech's key personnel, including the Ulrys, Dualtech was not the seller corporation, National City was. Next, even though Dualtech was

> not the seller corporation, it ceased doing ordinary business and dissolved *before* MWS purchased the assets. Lastly, although MWS may have assumed payment of some of Dualtech's liabilities necessary to continue normal business operations, MWS sent a letter to its customers and suppliers expressly stating that Dualtech went out of business and that MWS is a new corporation with different ownership. MWS, therefore, did not hold itself out to the world as an effective continuation of Dualtech. In reviewing the "totality of the transaction" from Dualtech to National City to MWS, we find that there is insufficient continuity of enterprise to justify the imposition of successor liability. *Exhibit A.*

The lower court did not err in dismissing the Successor Liability claim; the appellate court did not err in affirming. Appellant's request for eave must be denied.

ii. Appellant's Successor Liability claim based upon transfer of goodwill must fail as a matter of law, as there was no "transfer" of goodwill from Dualtech to MWS, and MWS paid for "general intangibles" in the Purchase Agreement with the bank.

Despite Appellant's contentions, MWS did not take assets directly from Dualtech, and any "goodwill" asset of Dualtech was transferred from the banks. "Good will" is considered an intangible asset, and is defined as "property of an intangible nature," and "the favor which the management of a business wins from the public" and "the fixed and favorable consideration of customers arising from established and well-conducted business." *Black's Law Dictionary (5th ed); See also Malone & Hyde, Inc v US*, 568 F2d 474, 475 (CA 6, 1978).

An asset, tangible or intangible, may be secured by a lien or encumbrance. The Uniform Commercial Code defines a "general intangible" as follows:

> (pp) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before

> extraction. The term includes payment intangibles and software. MCL 440.9120(pp).

Appellant attempts to show an alleged failure of MWS to pay for the transfer of goodwill, and claims that this is evidence of "successor liability." Yet, Appellant continues to allege a fraudulent conveyance. This Count was expressly dismissed by the lower court, finding no evidence of fraud. Even had the court not found this, pursuant to MCL 566.17 to show a fraudulent conveyance, Appellant must show that the corporation is a person under the act; that it made a conveyance; that it did so with actual intent to hinder, delay, or defraud creditors; and that plaintiff is a creditor under the act. MCL 566.17; *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 658 (1994). Appellant commingled the elements of his claims to the point that the lower court's July 2, 2003 Opinion notes ". . . plaintiff contends successor liability can be established under the theory that [MWS] did not give any consideration for the goodwill of Dualtech, and thus violated the fraudulent conveyance statute." *Exhibit D, p 10, emphasis added.* However, the Court expressly dismissed the Fraudulent Conveyance count (Count IV) of Appellant's Complaint. *Exhibit F, p 15.*

First, the case relied upon by Appellant, *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374; 512 NW2d 86 (1994), is a fraudulent conveyance case. In *SCD Chemical*, a judgment creditor sought to garnish accounts of a debtor corporation, Maintenance. Maintenance then declared bankruptcy. The court stated:

> After Maintenance turned its collateral over to Security Bank, the bank commenced a foreclosure action on its perfected security interest in Maintenance's assets . . . . In an order dated November 17, 1989, the trial

> court determined that Security Bank had a perfected security interest in all the assets of Maintenance that was superior to plaintiff's claim. *Id*, 376.

All assets of Maintenance were sold by Security Bank to another company, Rite-Made Chemical Company, Inc. The *SCD* plaintiff claimed that an officer of Maintenance had fraudulently conveyed assets. The court found that the *SCD* plaintiff failed to show " any transfer of assets, such as inventory, equipment, chemical formulas, customer lists or goodwill, without fair consideration for the purpose of defrauding plaintiff in violation of MCL 566.15." *Id*, 380.

Like the claims in SCD, Appellant's claims in the instant case were properly dismissed. The July 2003 order on this issue was based on the alleged transfer of Dualtech's goodwill without consideration. Appellant has shown no evidence that a "transfer" of Dualtech's "goodwill assets" occurred between Dualtech and MWS. Instead, those "goodwill assets" or "general intangibles" were clearly included in the Security Agreement between Dualtech and the bank. *Exhibit N*. The Security Agreement states, in pertinent part:

> . . . For valuable consideration, Grantor [Dualtech] grants to Lender [bank] a security interest in the Collateral to secure the Indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the Collateral, in addition to any other rights Lender may have by law.
>
> **DEFINITIONS.** The following words shall have the following meanings when used in this Agreement. Terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code. . . .
>
> **Collateral.** The word "Collateral" means the following described property of the Grantor, whether now owned or hereafter acquired, . . . :
>
> **All inventory, chattel paper, accounts, equipment and general intangibles**

. . .

(c) All accounts, general intangibles, . . . *Exhibit N, Security Agreement.*

Further, general intangibles are also expressly included in the Purchase Agreement between MWS and the bank. *Exhibit I.* The Purchase Agreement states, in part:

> A. Dualtech, Inc. ("Borrower") is indebted to National City, which indebtedness is secured by, among other things, a security interest in **all of Borrower's inventory, accounts, general intangibles and equipment**. . . (collectively, the "Assets").
>
> . . .
>
> C. Buyer [MWS] has offered to purchase the Assets from National City in a private sle under the Michigan Uniform Commercial Code ("UCC"), subject to the terms and conditions in this Agreement. *Exhibit I, Purchase Agreement, emphasis added.*

It is established by Michigan law, and undisputed here, that good will can be considered an asset. The instant evidence showed that the bank was a secured creditor, with priority and with a valid lien, upon which it foreclosed. Pursuant to the Security Agreement, the bank possessed a valid lien on all of Dualtech's assets, including general intangibles. MWS purchased the assets from the bank, and, pursuant to the Purchase Agreement, those assets included "general intangibles" including good will. MWS therefore purchased and paid for any "good will". The trial court did not err; the appellate court affirmed. Appellant's request for leave must be denied.

VII. THE APPELLATE COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF APPELLANT'S CLAIM FOR A CONSTRUCTIVE TRUST, AS THERE WERE AND ARE NO CIRCUMSTANCES JUSTIFYING IMPOSITION OF SUCH RELIEF.

The trial court properly denied Appellant's request for a constructive trust. A constructive trust may be imposed "where such trust is necessary to do equity or to prevent unjust enrichment . . . ." *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955);

Kammer Asphalt Paving Co v East China Township Sch, 443 Mich 176, 188; 504 NW2d 635 (1993). Constructive trusts may only be imposed when property "has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property." *Potter v Lindsay,* 337 Mich 404, 411; 60 NW2d 133 (1953). Constructive trusts may not be imposed upon parties who have not contributed to the reasons for imposition. *Ooley, supra,* 158; *Kammer, supra.* The burden of proof rests with the party seeking the constructive trust. *MacKenzie v Fritzinger,* 370 Mich 284; 121 NW2d 410 (1963).

The undisputed facts showed that Appellant did not support his request. Appellant had notice of the sale of the assets by National City Bank, had opportunity to purchase the assets, and refused to do so. *Exhibit J.* National City Bank then sold the assets to MWS, through Pitonyak as an officer of MWS. *Exhibit L.* Appellant made unsupported allegations of fraud, even though Appellant also admitted he had no evidence that any of the actions he alleges ever occurred, apart from a "gut feeling:" *Exhibit J , p 49.*

Appellant admitted he had notice of the sale, chose not to purchase the assets, and alleges no fraud on the part of the banks. *Exhibit J.* Appellant has already litigated based on his "feeling." The appellate court found that, "[w]ith no evidence of fraud, the trial court did not err in dismissing plaintiff's claim for imposition of a constructive trust." *Exhibit A.* The trial court properly dismissed Appellant's claim for a constructive trust, and that dismissal was affirmed. Appellant's request for leave must be denied.

CONCLUSION

Appellant, both at the trial court level and before the court of appeals, brought claims of statutory conversion, constructive trust, successor liability and piercing the corporate veil. In addition to those claims, at the appellate court, Appellant claimed that the trial court erred based upon operation of court rules. The trial court, upon review of the evidence before it, addressed each of Appellant's claims, and dismissed them. The court of appeals, in its opinion and order, addressed each of the claims, reviewing de novo the evidence with which it was presented, and affirmed the trial court. The court of appeals committed no error, nor did the trial court. The facts, issues and evidence of this case have been examined in great detail, and the decision of the court of appeals, affirming the decision of the trial court, must stand. This matter is not worthy of leave.

Appellant has brought the sale of the foreclosed assets before the lower court several times. Appellant has brought the same issues before the appellate court. Each time, the trial court has decided on the pleadings and the evidence that there was no fraud, and the appellate court, upon review, found the same. Appellant's request for leave must be denied.

RELIEF REQUESTED

For the reasons stated herein, Appellees respectfully request this Court deny Appellant's leave to appeal, and affirm the court of appeals' Order dated November 29, 2005, and the decision of the Macomb County Circuit Court.

Respectfully submitted,

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